

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD H. ZIEMBA and U.S. POSTAL SERVICE,
POST OFFICE, Jupiter, FL

*Docket No. 02-1002; Submitted on the Record;
Issued December 17, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly rescinded the acceptance of appellant's claim for depression and somatoform pain disorder.

This case has been before the Board twice previously. By decision dated April 23, 1997, the Board remanded the case to the Office on the grounds that the record submitted to the Board was incomplete and would not permit an informed adjudication of the case by the Board. The Board noted that the record reflected that the complete case record consisted of 1,839 numbered pages, whereas only 1,001 pages were present.¹ Subsequent to the April 23, 1997 decision of the Board, the Office reissued a June 15, 1994 decision of an Office hearing representative, with a new issue date of February 17, 1998.² Appellant, through counsel, requested reconsideration and submitted additional medical evidence. By decision dated July 1, 1998, the Office denied modification of the prior decision. Appellant again filed an appeal with the Board and, by decision dated April 28, 1999, the Board again remanded the case to the Office for

¹ Docket No. 95-277.

² The procedural history indicates that on February 20, 1991 appellant, then a 27-year-old letter carrier, filed a traumatic injury claim, alleging that on February 19, 1991 he injured his lower back while lifting flats of mail. On April 25, 1991 the Office accepted that appellant sustained an employment-related lumbosacral strain. By letter dated September 16, 1992, the Office proposed to terminate appellant's compensation based on the opinions of Drs. Philip O. Lichtblau and Daniel E. Stalker, both of whom are Board-certified in orthopedic surgery. By decision dated October 16, 1992, the Office finalized the termination, effective October 17, 1992. In a letter dated February 8, 1993, the Office informed appellant that it had made a preliminary determination that he had received an overpayment in compensation in the amount of \$4,728.21 because he had continued to receive compensation after the termination of benefits on October 17, 1992. Following appellant's request for a hearing on both matters, a hearing was held before an Office hearing representative on March 22, 1994. In a decision dated June 15, 1994, the hearing representative affirmed the October 16, 1992 Office decision, terminating appellant's benefits and finalized the overpayment decision, finding that appellant was at fault and, therefore, not entitled to waiver. The hearing representative, however, remanded the case to the Office for a second opinion evaluation to determine if appellant sustained a disabling psychological condition causally related to the accepted injury.

reconstruction of the record. The Board noted that the record submitted by the Office consisted of merely 847 pages and did not contain the October 16, 1992 decision, the transcript of the hearing held on March 22, 1994 or any information regarding whether an overpayment in compensation had been created in the case. The Board remanded the case to the Office for reconstruction and proper assemblage of the record, to be followed by a *de novo* decision on the merits of the claim.³ The law and facts as set forth in the previous Board decisions are incorporated herein by reference.

Subsequent to the Board's April 28, 1999 decision, on July 23, 1999 the Office accepted that appellant sustained an employment-related depression and somatoform pain disorder.⁴ Appellant, however, was not placed on wage-loss compensation because the Office continued to develop the claim by inquiring regarding any benefits appellant received from the Department of Veterans Affairs (VA). By decision dated April 9, 2001, the Office rescinded acceptance of the conditions of depression and somatoform pain disorder. The Office noted that on May 17, 2000 it received information from the VA that appellant had been rated with a 50 percent disability for adjustment disorder with depressed mood dating back to April 7, 1995 caused by injuries sustained while appellant was in the military.⁵ The Office further noted that, following receipt, appellant's VA records were forwarded to Dr. Kubski, who had performed a second opinion evaluation for the Office. The Office noted that, in a June 1, 2000 report, Dr. Kubski advised that this new information altered his opinion regarding whether appellant's psychiatric condition was related to the 1991 employment injury. The instant appeal follows.

The Board finds that the Office met its burden of proof to rescind acceptance of appellant's emotional condition.

Once the Office accepts a claim and pays compensation benefits, it has the burden of justifying the termination or modification of compensation. This holds true where the Office later decides that it erroneously accepted a claim. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous.⁶

To establish appellant's claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁷ Workers' compensation law is not applicable to

³ Docket No. 99-150.

⁴ The Office had referred appellant to Dr. George M. Kubski, who is Board-certified in psychiatry and neurology, for a second opinion evaluation and, based on his opinion, accepted that appellant's depression and somatoform pain disorder were employment related.

⁵ The record indicates that in August 1981, while serving in the military, appellant sustained a fracture at C2 and spinal cord injury at T3, right brachial plexus palsy and right shoulder injury.

⁶ 20 C.F.R. § 10.610 (1999).

⁷ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

each and every injury or illness that is somehow related to employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within coverage of the Federal Employees' Compensation Act.⁸ On the other hand, there are situations when an injury has some connection with the employment, but nonetheless does not come within the coverage of workers' compensation because it is not considered to have arisen in the course of the employment.⁹

In the instant case, the Office rescinded acceptance of appellant's depression and somatoform pain disorder causally related to the February 19, 1991 lumbosacral strain, based on the opinion of Dr. Kubski, who performed a second opinion evaluation for the Office. By report dated February 19, 1999, Dr. Kubski diagnosed major depressive disorder and pain disorder associated with both psychological and medical conditions secondary to the 1991 employment injury. In a work capacity evaluation dated February 23, 1999, the physician advised that appellant was temporarily totally disabled due to severe depression but should, from a psychiatric standpoint, be able to return to work in approximately three months.

Following receipt of appellant's VA records on May 17, 2000 by letter dated May 23, 2000, the Office forwarded the records to Dr. Kubski, along with a set of questions. In a report dated June 1, 2000, he advised that, after his review of the VA records, appellant's chronic pain and adjustment disorder preexisted the 1991 employment injury.

The record further indicates that, in a rating decision dated May 12, 1997, the VA awarded appellant a 50 percent disability for adjustment disorder and depressed mood due to his service-connected injuries. In a June 9, 1998 decision, the VA found that appellant was unemployable because of psychological and medical reasons and because of the narcotics he used to alleviate pain from his spinal cord injuries.

The Board, therefore, finds that, as Dr. Kubski carefully reviewed appellant's entire medical record and clearly explained his rationale in finding that appellant's chronic pain and adjustment disorder preexisted the 1991 employment injury, as supported by the VA findings, the Office permissibly rescinded acceptance of appellant's claim that he sustained an emotional condition causally related to the February 19, 1991 employment injury.

The Board, however, finds that the record before the Board does not indicate that the Office followed the Board's direction in its decision dated April 28, 1999.¹⁰ As stated above, in the April 28, 1999 decision, the Board remanded the case to the Office for reconstruction of the record because the record before it was incomplete. Following reconstruction and proper assemblage of the record, the Office was to issue a *de novo* decision on the merits of the claim, *i.e.*, (1) whether the Office had permissibly terminated appellant's compensation on the grounds

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *Supra* note 3.

that any disability resulting from the lumbosacral strain he sustained on February 19, 1991 had ceased; and (2) whether an overpayment in compensation in the amount of \$4,728.21 had been created and, if so, whether appellant was entitled to waiver of the overpayment. This the Office did not do. The case must, therefore, be remanded to the Office to determine whether appellant continues to have residuals of the February 19, 1991 lumbosacral strain and whether an overpayment in compensation in the amount of \$4,728.21 had been created, to be followed by a *de novo* decision on the merits of the claim.

The April 9, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed. The case is, however, remanded to the Office for proceedings consistent with this opinion of the Board.

Dated, Washington, DC
December 17, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member